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June 14, 2007

RQ-0590-GA

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RE: Whether a County Judge may be appointed as the County Budget Officer in a county with a population over 125,000 and 225,000 under Subchapter C of the Local Government Code §111.046-111.060.

Dear General Abbott:

Background: Williamson County is a county with a population of roughly 350,000. Williamson County currently operates under Subchapter B of the Local Government Code but wishes to operate under Subchapter C. The question is this: if the county chooses to operate under Subchapter C, can the commissioner's court appoint the County Judge to serve as the County's Budget Officer?

Local Government Code: It is clear under Subchapter A of the Local Government Code that counties with a population of less than 225,000, "the County Judge serves as the budget officer for the Commissioner's Court of the County", (See Local Government Code §111.002). It is also clear, under Subchapter B, that counties with a population of more than 225,000, "the County Auditor serves as the Budget Officer for the Commissioner's Court of the county", (See Local Government Code §111.032). But under Subchapter C, which is applicable to counties with a population of more than 125,000, the statute states that:

- (a) The Commissioner's Court of the county may appoint a County Budget Officer to prepare the county budget for the fiscal year.
- (b) A county that establishes the office of County Budget Officer may abolish that office by a formal action of the Commissioner's Court . . . [but] If the office is abolished, the duties of Budget Officer shall be performed by:

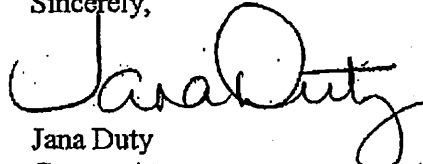
Page Two
General Greg Abbott
June 14, 2007

- (1) The County Judge, if the county has a population of 225,000 or less;
- (2) The County Auditor, if the county has a population of more than 225,000.

The position or office of Budget Officer, if created under Subchapter C, is also able to "assist the Commissioner's Court in the performance of the Court's duties relating to the efficiency and effectiveness of county operations" (See §111.071 Local Government Code).

Can Williamson County, a county of roughly 350,000, operate under Subchapter C and appoint the County Judge as the County's Budget Officer?

Sincerely,



Jana Duty
County Attorney

JD/vh



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 26, 2007

The Honorable Jana Duty
Williamson County Attorney
405 M.L.K. Street, Box 7
Georgetown, Texas 78626

Opinion No. GA-0580

Re: Whether a county that chooses to operate under subchapter C of chapter 111, Local Government Code, may appoint its county judge as its county budget officer (RQ-0590-GA)

Dear Ms. Duty:

Subchapter C of chapter 111 of the Local Government Code authorizes a commissioners court in a county with a population in excess of 125,000 to appoint a county budget officer to prepare the proposed county budget. *See* TEX. LOC. GOV'T CODE ANN. §§ 111.061–.62 (Vernon 1999) (Subchapter C: Alternate Method of Budget Preparation in Counties With Population of More Than 125,000). You ask whether a county that chooses to operate under subchapter C may appoint its county judge to serve as its county budget officer.¹

I. Background

You inform us that Williamson County, Texas, with a population of approximately 350,000, currently operates under subchapter B of chapter 111, Local Government Code. *See* Request Letter, *supra* note 1, at 1. Williamson County desires, however, to operate under subchapter C. *See id.* Subchapters A, B, and C of chapter 111 prescribe the county budget preparation requirements applicable to a county, depending on the county's population size. *See* TEX. LOC. GOV'T CODE ANN. §§ 111.001–.014 (Vernon 1999 & Supp. 2007) (subchapter A); *id.* §§ 111.031–.045 (subchapter B); *id.* §§ 111.061–.075 (subchapter C). Subchapter A applies only to a county with "a population of 225,000 or less and that does not operate under Subchapter C." *Id.* § 111.001 (Vernon 1999). In a county operating under subchapter A, the county judge serves as the county budget officer. *See id.* § 111.002. On the other hand, subchapter B applies to a county with a population in excess of 225,000 and that does not operate under subchapter C. *See id.* § 111.031. In a county operating under subchapter B, the county auditor serves as the county budget officer. *See id.* § 111.032. Finally, subchapter C "applies only to a county that has a population of more than 125, 000 and that chooses to operate under [subchapter C] instead of under subchapter A or B" and authorizes a county

¹*See* Letter from Honorable Jana Duty, Williamson County Attorney, to Honorable Greg Abbott, Attorney General of Texas, at 1 (June 14, 2007) (on file with the Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Request Letter].

operating under its provisions to appoint a county budget officer. *Id.* §§ 111.061–.062. Thus, in a county such as Williamson County with a population in excess of 225,000, the county auditor serves as the county budget officer unless the county appoints a county budget officer pursuant to subchapter C.

II. Analysis

Section 111.062, the subchapter C provision authorizing the appointment of a county budget officer, provides in relevant part:

(a) The commissioners court of the county may appoint a county budget officer to prepare a county budget for the fiscal year.

(b) A county that establishes the office of county budget officer may abolish that office only by a formal action of the commissioners court. . . . If the office is abolished, the duties of budget officer shall be performed by:

(1) the county judge, if the county has a population of 225,000 or less; or

(2) the county auditor, if the county has a population of more than 225,000.

Id. § 111.062.

While section 111.062 expressly authorizes the commissioners court to appoint the county budget officer, it does not specify who the commissioners court may appoint as the county budget officer. *See id.* And, as particularly relevant with respect to the application of Texas common law discussed below, the statute does not expressly authorize the commissioners court to appoint the county judge as the county budget officer. *See id.*

Under Texas common law, the county commissioners court may not appoint one of its members to an office over which the commissioners court has appointment authority. *Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928). The county judge is a member of the commissioners court and the presiding officer when present. *See* TEX. LOC. GOV'T CODE ANN. § 81.001 (Vernon 1999); *see also Rheuark v. Shaw*, 628 F.2d 297, 301 n.5 (5th Cir. 1980) (“The commissioners court, consisting of the county judge and four county commissioners, is the governing and administrative body of a county in Texas.”). Under the common law, “all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint” because of the inherent incompatibility of a person being “both a member of a body making the appointment and an appointee of that body.” *Ehlinger*, 8 S.W.2d at 674; *see also St. Louis Sw. Ry. Co. of Tex. v. Naples Indep. Sch. Dist.*, 30 S.W.2d 703, 706 (Tex. Civ. App.—Texarkana 1930, no writ) (“[i]t is contrary to the policy of the law for an officer to use his official appointing power to place himself in office”).

The Legislature has not abrogated the common-law rule against self-appointment with respect to the appointment of the county judge as the county budget officer. *See* TEX. LOC. GOV'T CODE ANN. § 111.062 (Vernon 1999). The Legislature may abrogate the common law if it plainly expresses such an intent. *Enos v. State*, 889 S.W.2d 303, 305 (Tex. Crim. App. 1994); *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121, 122–23 (Tex. App.—San Antonio 1997, writ denied). The Legislature has not expressed such an intent in section 111.062. *See* TEX. LOC. GOV'T CODE ANN. § 111.062 (Vernon 1999). Under established principles of statutory construction, it is presumed that the Legislature adopted section 111.062 with knowledge of and with reference to the common law prohibiting self-appointment. *See Tex. Dep't of Pub. Safety v. Loeb*, 149 S.W.3d 741, 745 (Tex. App.—Austin 2004, no pet.) (citing *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942)) (“A statute is presumed to have been enacted by the legislature with complete knowledge of the *existing* law and with reference to it.”).²


Thus, consistent with Texas common law, the commissioners court cannot appoint the county judge as the county budget officer for the county. *Cf. Ehlinger*, 8 S.W.2d at 674 (holding that under the common-law prohibition on self-appointment, a commissioners court “cannot appoint as its attorney one of its own members, to wit, the county judge”). And, in answer to your question, we conclude that a county that chooses to operate under subchapter C of chapter 111, Local Government Code, may not appoint its county judge to serve as its county budget officer.

²Consistent with our conclusion, section 111.062 was apparently adopted to allow the larger counties to have a full-time, separate county budget officer. In 1981, the Legislature adopted Senate Bill 54 amending the substance of sections 111.061 and 111.062 to have a broader application. *See* Act of Mar. 19, 1981, 67th Leg., R.S., ch. 17, § 1, 1981 Tex. Gen. Laws 22. A bill analysis for Senate Bill 54 explains that the provisions providing for the appointment of a county budget officer were originally adopted in 1977 to allow certain counties “to appoint a full-time budget officer.” HOUSE STUDY GROUP, HOUSE COMM. ON INTERGOVERNMENTAL AFFAIRS, BILL ANALYSIS, Tex. S.B. 54, 67th Leg., R.S. (1981). Noting that only Dallas County had a full-time budget officer, the analysis states that the 1981 amendment would grant other counties, such as Harris County, where preparing the budget is “not a part-time job,” the same option. *See id.*

S U M M A R Y

Under Texas common law, a county commissioners court cannot appoint one of its members to an office over which the commissioners court has appointment authority. Subchapter C of chapter 111, Local Government Code, authorizing a county commissioners court of an eligible county to appoint a county budget officer, does not abrogate the common law. Accordingly, a county that chooses to operate under subchapter C is not authorized to appoint its county judge to serve as its county budget officer.

Very truly yours,



GREG ABBOTT
Attorney General of Texas

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First Assistant Attorney General

ANDREW WEBER
Deputy Attorney General for Legal Counsel

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Chair, Opinion Committee

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Assistant Attorney General, Opinion Committee



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2008

The Honorable Bill Burnett
San Jacinto County Criminal District Attorney
#1 State Highway 150, Room 21
Coldspring, Texas 77331-0430

Opinion No. GA-0656

Re: Whether a county policy prohibiting the rehire of an individual within one year after terminating an employment relationship with the county applies to the hiring of a deputy constable (RQ-0681-GA)

Dear Mr. Burnett:

You explain that the San Jacinto County Commissioners Court has adopted a policy that generally prohibits the rehiring of an individual who has terminated an employment relationship with the county for a period of one year following the termination:

When an employee terminates from San Jacinto County, the employee is not eligible for rehire for a period of one year, unless the employee was classified as a part-time employee and rehired as a full [-]time employee.¹

You ask whether this policy may be applied to restrict a county constable's hiring of a deputy constable who, within one year prior to being hired by the constable, terminated a full-time position with another county department. *See* Request Letter, *supra* note 1, at 1.

The powers of both a county commissioners court and a constable are limited. A county commissioners court's powers encompass only those expressly delegated to the commissioners court by the Texas Constitution or statutes and those necessarily implied therefrom. *See* TEX. CONST. art. V, § 18(b) (providing that a commissioners court "shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed"); *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948); *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941); *Hooten v. Enriquez*, 863 S.W.2d 522, 529 (Tex. Civ. App.—El

¹Letter from Honorable Bill Burnett, San Jacinto County Criminal District Attorney, to Honorable Greg Abbott, Attorney General of Texas, at 2 (Feb. 21, 2008) (footnote added) (on file with the Opinion Committee, *also available at* <http://www.texasattorneygeneral.gov>) [hereinafter Request Letter] (quoting San Jacinto County Policy on Termination no. 3 (attached to Request Letter)).

Paso 1993, no writ); *Renfro v. Shropshire*, 566 S.W.2d 688, 690 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e); see also *Pritchard & Abbott v. McKenna*, 350 S.W.2d 333, 334 (Tex. 1961) (finding that, although a commissioners court is not “expressly clothed with constitutional or statutory authority to contract for” certain services, it has authority that may be implied “from the powers that have been expressly granted to and the duties imposed upon this body by law”). Likewise, a constable, who holds an elected, constitutional office, is limited to those powers expressly conferred by or necessarily implied from the constitution and statutes. See *Crosthwait v. State*, 138 S.W.2d 1060, 1061 (Tex. 1940) (stating that an “officer must look to the Act by which his office is created . . . to ascertain the extent of his powers”); Tex. Att’y Gen. Op. No. JC-0239 (2000) at 2 (stating that a county officer is limited to those powers expressly conferred by or necessarily implied from statutes).

Both a county commissioners court and an elected district, county, or precinct officer play a role in the officer’s hiring of an employee. The commissioners court’s role is grounded in its jurisdiction over the county’s budget. See *Abbott v. Pollock*, 946 S.W.2d 513, 517 (Tex. App.—Austin 1997, pet. denied) (noting that a commissioners court’s authority over the positions in the sheriff’s office stems from its budgetary power). Thus, in general, when a district, county, or precinct officer “requires the services of deputies, assistants, or clerks in the performance of the officer’s duties,” the officer must “apply to the commissioners court . . . for the authority to appoint the employees.” TEX. LOC. GOV’T CODE ANN. § 151.001(a) (Vernon 2008). After receiving such an application, the commissioners court “shall determine the number of employees that” the officer may appoint and “shall authorize their appointment.” *Id.* § 151.002. Section 86.011(a) of the Local Government Code provides similarly with respect to a constable’s appointment of deputy constables:

An elected constable who desires to appoint a deputy must apply in writing to the commissioners court of the county and show that it is necessary to appoint a deputy in order to properly handle the business of the constable’s office that originates in the constable’s precinct. The application must state the name of the proposed deputy. The commissioners court shall approve and confirm the appointment of the deputy only if the commissioners court determines that the constable needs a deputy to handle the business originating in the precinct.

Id. § 86.011(a); see *State v. Johnson*, 52 S.W.2d 110, 111 (Tex. Civ. App.—San Antonio 1932, writ dismissed w.o.j.) (explaining that the Legislature’s adoption of amendments to the statutory predecessor to section 86.011 “left intact” the statutory predecessor to sections 151.001 through 151.004). The commissioners court may later reconsider the number of positions in a particular department during the annual budget process. Tex. Att’y Gen. Op. No. JC-0239 (2000) at 2. And the commissioners court bears “sole authority to ‘set the amount of the compensation, office and travel expenses, and all other allowances for . . . employees who are paid wholly from county funds.’” Tex. Att’y Gen. Op. No. JC-0239 (2000) at 2 (quoting TEX. LOC. GOV’T CODE ANN. § 152.011 (Vernon 1999)).

An elected officer's role—which the Beaumont court of appeals has described as encompassing “a broad discretion in the selection of their staff and their employees”—is based on the officer's responsibility to perform the constitutional and statutory duties assigned to the officer. *Williams v. Bagley*, 875 S.W.2d 808, 811 (Tex. App.—Beaumont 1994, no writ); *see also Abbott*, 946 S.W.2d at 517 (“The limitations on the powers of the [c]ommissioners [c]ourt are founded in the policy that elected officers, such as sheriffs, discharge the public trust and carry the responsibility for the proper discharge of that trust, and therefore, should be free to select persons of their own choice to assist them.”). “In Texas, an elected officer occupies a sphere of authority, which is delegated to that officer by the Constitution and laws, [with] which another officer may not interfere . . . or usurp.” *Abbott*, 946 S.W.2d at 517. Accordingly, when a commissioners court has approved an elected officer's application to appoint certain positions, it is the elected county officer who may appoint the employees. TEX. LOC. GOV'T CODE ANN. § 151.003 (Vernon 2008). Moreover, a commissioners court is expressly prohibited from attempting “to influence the appointment of any person to an employee position authorized by the court.” *Id.* § 151.004. And, although Local Government Code section 86.011 specifically requires a constable to list the name of a proposed deputy in an application to the commissioners court, it does not give the commissioners court authority to influence the appointment of a particular individual or to refuse the constable's application based upon the court's objection to the proposed deputy named in the application. *See id.* § 86.011(a).

Thus, the Fourteenth District Court of Appeals determined in 1991 that “[a]ppointment of deputy constables is within the exclusive control of the Constable.” *Renken v. Harris County*, 808 S.W.2d 222, 226 (Tex. App.—Houston [14th Dist.] 1991, no writ). The commissioners court, even by virtue of its powers over the county budget, “has no authority . . . to appoint or terminate a deputy constable.” *Id.*; *see also* Tex. Att'y Gen. Op. No. O-7081 (1946) at 7 (stating that, under section 86.011's statutory predecessors, “[t]he constable makes the appointment [of a deputy constable] and is the only person who can discharge” the deputy constable); *cf. Abbott*, 946 S.W.2d at 517 (stating that a commissioners court has no authority to appoint or terminate a sheriff's office employee or to dictate the terms of employment of a sheriff's employee); *Renfro v. Shropshire*, 566 S.W.2d 688, 692 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (stating that a commissioners court lacks authority “to screen applicants or to veto appointments made by the county clerk”).

Courts and this office repeatedly have determined that county-wide policies that would impinge upon an elected officer's authority to appoint and fire individuals of the officer's choosing do not apply to the officer. For example in 1994 the United States Court of Appeals for the Fifth Circuit, construing Texas law, determined that a commissioners court had no authority to adopt a policy allowing elected county officials (other than commissioners) to terminate employees only for just cause. *See Garcia v. Reeves County*, 32 F.3d 200, 203 (5th Cir. 1994). And this office concluded in 1986 that a county policy prohibiting county employees from running for office in a partisan election did not apply to the employees of elected officers who did not sit on the commissioners court. *See* Tex. Att'y Gen. Op. No. JM-521 (1986) at 3. As the 1986 opinion states:

The commissioners court has no power to interfere in the hiring decisions made by other county officers; therefore, it may not

require those county officers to terminate an employee who becomes a candidate for partisan political office. This policy does not affect the employment decisions of elected constitutional officers other than members of the commissioners court.

Id.

Although neither a court nor this office previously has considered whether a policy prohibiting the rehiring of an employee for a period of one year can be applied to an elected district, county, or precinct officer other than a county commissioner, such as a constable, we believe the answer is clear: such a policy impinges upon the constable's authority to appoint individuals of the constable's choosing. Accordingly, the San Jacinto County policy at issue here cannot be applied to bar a constable from appointing a deputy who has terminated a full-time employment relationship with the county within the past year.²

²You suggest that our conclusion may affect policies adopted by some counties "requiring drug screening as a prerequisite for employment and [requiring] a criminal history check for positions requiring the use of computers, access to master keys, or other sensitive positions." Request Letter, *supra* note 1, at 2. This opinion considers only the policy you describe that prohibits the rehire of a former county employee for one year following the employee's separation from employment. *See id.* at 1. We do not address the validity of any other policy.

S U M M A R Y

A county policy adopted by the commissioners court that prohibits the rehire of an individual whose employment relationship with the county terminated within the past year does not apply to a constable.

Very truly yours,

A handwritten signature in black ink, appearing to read "Greg Abbott", written over a light blue horizontal line.

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ANDREW WEBER
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